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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 SABRINA A. NEWSOM,

Civil No. 06-1017-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15
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26 AIKEN, Judge:

27 Claimant, Sabrina Newsom, brings this action appealing the
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1 denial of her applications for disability insurance benefits and
2 supplemental security income (SSI) benefits under Titles II and
3 XVI of the Social Security Act (the Act), 42 U.S.C. §§ 401-33 and
4 1381-83f. For the reasons set forth below, the Commissioner's
5 decision is affirmed.

6 PROCEDURAL BACKGROUND

7 Plaintiff protectively filed her application for SSI
8 benefits on May 29, 2003. Plaintiff's applications were denied,
9 and plaintiff requested a hearing before an Administrative Law
10 Judge (ALJ). A hearing was held on November 15, 2004, after
11 which the ALJ ruled that plaintiff was not disabled. The Appeals
12 Council denied plaintiff's request for review, making the ALJ's
13 decision the final agency decision. See 20 C.F.R. §§ 416.1481,
14 422.210.

15 STATEMENT OF THE FACTS

16 Plaintiff was 27 years old on the date of the hearing. Tr.
17 22. Plaintiff has worked as a tanning consultant, restaurant
18 hostess and cashier, cherry sorter, and food preparer. Tr. 75.
19 Plaintiff last worked in April 2003. Id. Plaintiff alleges
20 disability based on a combination of impairments, including
21 fibromyalgia.

22 STANDARD OF REVIEW

23 This court must affirm the Secretary's decision if it is
24 based on proper legal standards and the findings are supported by
25 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
26 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
27 mere scintilla. It means such relevant evidence as a reasonable
28 mind might accept as adequate to support a conclusion."

1 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
2 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
3 The court must weigh "both the evidence that supports and
4 detracts from the Secretary's conclusions." Martinez v. Heckler,
5 807 F.2d 771, 772 (9th Cir. 1986).

6 The initial burden of proof rests upon the claimant to
7 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
8 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
9 an "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental
11 impairment which can be expected . . . to last for a continuous
12 period of not less than 12 months. . . ." 42 U.S.C.
13 § 423(d)(1)(A).

14 The Secretary has established a five-step sequential
15 process for determining whether a person is disabled. Bowen v.
16 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
17 416.920. First the Secretary determines whether a claimant is
18 engaged in "substantial gainful activity." If so, the claimant
19 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
20 §§ 404.1520(b), 416.920(b).

21 In step two the Secretary determines whether the claimant
22 has a "medically severe impairment or combination of
23 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
24 §§ 404.1520(c), 416.920(c). If not, the claimant is not
25 disabled.

26 In step three the Secretary determines whether the
27 impairment meets or equals "one of a number of listed impairments
28 that the Secretary acknowledges are so severe as to preclude

1 substantial gainful activity." Id.; see 20 C.F.R.

2 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
3 presumed disabled; if not, the Secretary proceeds to step four.
4 Yuckert, 482 U.S. at 141.

5 In step four the Secretary determines whether the claimant
6 can still perform "past relevant work." 20 C.F.R.

7 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
8 disabled. If she cannot perform past relevant work, the burden
9 shifts to the Secretary. In step five, the Secretary must
10 establish that the claimant can perform other work. Yuckert, 482
11 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
12 (f). If the Secretary meets this burden and proves that the
13 claimant is able to perform other work which exists in the
14 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
15 416.966.

16 DISCUSSION

17 At step one of the five step sequential evaluation process
18 outlined above, the ALJ found that plaintiff had not engaged in
19 substantial gainful activity during the time period considered.
20 Tr. 16, 20, Finding 1. This finding is not disputed. At step
21 two, the ALJ found that plaintiff had the following severe
22 impairments: history of endometriosis, post-traumatic stress
23 disorder, depression, personality disorder, and fibromyalgia.
24 Tr. 16-17, 20, Finding 2. This finding is not disputed. At step
25 three, the ALJ found that plaintiff's impairments did not meet or
26 equal the requirements of a listed impairment. Id. This finding
27 is not disputed.

28 The ALJ determined that plaintiff had the residual

1 functional capacity (RFC) to perform light work including lifting
2 and carrying 20 pounds occasionally; lifting and carrying 10
3 pounds frequently; stand and/or walk for thirty minutes at a time
4 for four hours total in an 8-hour workday; sit for four hours in
5 an 8-hour workday; occasionally stoop, crouch, and climb; limited
6 to simple, routine repetitive work and should only engage in
7 occasional interaction with the public and co-workers. Tr. 19,
8 20, Finding 4. 20 C.F.R. §§ 404.1567, 416.967. This finding is
9 disputed. Pl's Mem. at p. 3-5.

10 At step four, the ALJ found that plaintiff had no past
11 relevant work as her previous work was not performed at
12 substantial gainful activity levels. Tr. 19,20, Finding 5. This
13 finding is not disputed. Finally, at step five, the ALJ found
14 that, based on plaintiff's RFC and relying on a vocational
15 expert's (VE) testimony, plaintiff could perform work existing in
16 significant numbers in the national economy. Tr. 19-20, Finding
17 6. Therefore, the ALJ found that plaintiff was not disabled as
18 defined by the Act. Tr. 20, Finding 7.

19 Plaintiff does not disagree with the ALJ's findings at
20 steps one through four of the sequential evaluation process.
21 Plaintiff does, however, disagree with the ALJ's assessment of
22 Dr. Gowen's opinion, which is relevant to the ALJ's RFC finding,
23 and ultimately to his step five finding.

24 ALJ's Assessment of Dr. Gowen's Opinion

25 The ALJ concluded that plaintiff had severe impairments
26 that were not disabling at step three. Therefore, the ALJ was
27 required to assess plaintiff's RFC before proceeding to step
28 four. Plaintiff's RFC is defined as the most she can do given

1 her impairments and limitations. SSR 96-8p. In assessing
2 plaintiff's RFC, he or she must consider the entire record and
3 explain how he weighs the medical evidence and testimony. SSR
4 96-5p.

5 Plaintiff alleges that the ALJ failed to give specific and
6 legitimate reasons for discounting Dr. Gowen's opinion as to
7 plaintiff's fibromyalgia. Pl's Mem. at p. 3-5. Dr. Gowen is
8 plaintiff's treating physician. Generally, more weight should be
9 given to the opinion of a treating doctor than to non-treating
10 doctors. Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995).
11 The Commissioner may reject the treating doctor's opinion for a
12 contradictory opinion for "specific and legitimate reasons." Id.

13 A diagnosis of fibromyalgia requires evidence of fatigue,
14 disturbed sleep, stiffness and pain in 11 out of 18 "tender
15 points," which are at fixed locations on the body. Rollins v.
16 Massanari, 261 F.3d 853, 855 (9th Cir. 2001). The American
17 College of Rheumatology criteria for a diagnosis of fibromyalgia
18 requires the presence of pain in these points, not just
19 tenderness, "[t]enderness is not to be considered 'painful.'"
20 Id.

21 Plaintiff was examined four times by Dr. Gowen in 2003:
22 June 25, tr. 226-27; July 23, tr. 223; August 27, tr. 224; and
23 November 12, tr. 221-22. In each exam, Dr. Gowen assessed
24 plaintiff for fibromyalgia. Tr. 221-27. In the June and
25 November exams, respectively, Dr. Gowen found plaintiff had
26 tenderness at 7 and 8 tender points, a finding less than the
27 required 11 tender points necessary to meet the diagnostic
28 criteria. Tr. 224, 226. Further, at both the June and November

1 exams, Dr. Gowen found that although plaintiff indicated some
2 tender points, she did not indicate the presence of pain as
3 required by the diagnostic criteria. Id.

4 In plaintiff's July and August exams, respectively, Dr.
5 Gowen noted plaintiff had tenderness at 13 and 11 tender points.
6 Tr. 221-23. Again, Dr. Gowen noted only tenderness, with no
7 finding of pain as required by the diagnostic criteria.
8 Moreover, the ALJ correctly noted that unlike the exams in June
9 and November where only 7 and 8 tender points were found, in both
10 the July and August exams, Dr. Gowen failed to test for any of
11 the control points used to determine malingering during a
12 fibromyalgia examination. Tr. 16, 221, 223.

13 The July exam revealed 13 tender points, and the August
14 exam revealed 11 tender points, although significantly, both
15 without a finding of pain and without testing for control points.
16 Therefore, I find that substantial evidence supports the ALJ's
17 questioning of plaintiff's diagnosis of fibromyalgia. Even,
18 however, if this court were to accept Dr. Gowen's diagnosis of
19 fibromyalgia and conclude it was a severe impairment, substantial
20 evidence exists for rejecting plaintiff's limitations assessed by
21 Dr. Gowen in September 2004. Tr. 18. Specifically, the ALJ gave
22 little weight to Dr. Gowen's opinion that plaintiff could stand
23 for only five minutes at a time; would miss three or more days of
24 work per month; and would need to lie down 8-10 times per shift.
25 Tr. 256-59. The ALJ gave Dr. Gowen's assessment little weight
26 because he failed to conduct any type of physical capacities
27 evaluation relevant to the assessed limitations. Dr. Gowen's
28 report, in fact, was essentially a reiteration of plaintiff's

1 pain behavior as noted by other doctors who attempted treatment
2 of plaintiff.

3 Finally, the administrative record does not contain
4 objective evidence to support such limitations. Instead, the
5 administrative record supports the ALJ's assessment of Dr.
6 Gowen's opinion. I find that the ALJ gave clear and convincing
7 reasons to reject Dr. Gowen's unsupported assessment of
8 plaintiff's limitations. Burch v. Barnhart, 400 F.3d 676, 680-81
9 (9th Cir. 2005) (court must uphold the Commissioner's denial of
10 benefits if the evidence is susceptible to more than one
11 reasonable interpretation, one of which supports the ALJ's
12 decision).

13 Finally, this court notes plaintiff's failure to challenge
14 the ALJ's credibility finding. Pl's Mem. at p. 3-5. The ALJ
15 found plaintiff not credible due primarily to substantial
16 evidence that plaintiff exaggerated pain behavior and engaged in
17 drug-seeking behavior. Tr. 17-18. Because there exists no
18 laboratory tests to confirm the diagnosis of fibromyalgia,
19 pursuant to SSR 99-2p, when a plaintiff's statements about the
20 intensity, persistence, or functionally limiting effects of
21 symptoms are not substantiated by objective medical evidence, the
22 ALJ "must consider all of the evidence in the case record,
23 including any statements by the individual and other persons
24 concerning the individual's symptoms . . . and must then make a
25 finding on the credibility of the individual's statements about
26 symptoms and their functional effects." Id. The ALJ did so
27 here, and substantial evidence supports his finding that
28 plaintiff's subjective complaints were not credible. Tr. 17-18.

1 **CONCLUSION**

2 The Commissioner's decision is based on substantial
3 evidence, and is therefore, affirmed. This case is dismissed.
4 IT IS SO ORDERED.

5 Dated this 4 day of June 2007.

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9
10 Ann Aiken
11 United States District Judge
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